

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**FRED J. CHURCH**

Claimant

VS.

**WHITE STAR COMMERCIAL COATING AND  
MC PHERSON CONTRACTORS, INC.**

Respondent

AND

**KANSAS BUILDING INDUSTRY WORKERS  
COMPENSATION FUND**

Insurance Carrier

Docket No. 204,042

**ORDER**

Respondent McPherson Contractors, Inc., and its insurance carrier Kansas Building Industry Workers Compensation Fund, appeal from a May 20, 1996 preliminary hearing Order entered by Special Administrative Law Judge William F. Morrissey.

**ISSUES**

Respondent/insurance carrier list the following issues in their Application for Review:

- "a. Whether the employee suffered an accidental injury?
- "b. Whether the claimants [sic] alleged injury arose out of and n[sic] the course of the claimant's employment?
- "c. Whether proper notice and a timely written claim were given?
- "d. Whether the respondent/insurance carrier were denied its [sic] right to due process with the administrative law judge's refusal to allow it [sic] to present evidence at the preliminary hearing?
- "e. Any and all other issues that can be raised before the Board."

Claimant contends that the Appeals Board lacks jurisdiction to review the preliminary Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant alleges he sustained personal injury by accident on June 6, 1995 while working for White Star Commercial Coating, Inc., (White Star) a subcontractor of McPherson Contractors, Inc., (McPherson). Claimant elected to bring his claim against his employer, White Star, as opposed to the principal contractor, McPherson, pursuant to K.S.A. 1994 Supp. 44-503.

The preliminary hearing from which this appeal was brought was held on May 8, 1996 before Special Administrative Law Judge William F. Morrissey. A prior preliminary hearing had been held on September 22, 1995 before Assistant Director David A. Shufelt. That first preliminary hearing resulted in an Order being issued by Assistant Director David A. Shufelt dated September 26, 1995 which granted claimant preliminary benefits of temporary total disability compensation and medical treatment. Thereafter, claimant learned that White Star was uninsured. Claimant filed for a second preliminary hearing, this time including McPherson on its application and demand.

As with the first preliminary hearing, respondent White Star did not appear. The May 8, 1996 preliminary hearing record contains only statements of Court and counsel dealing primarily with an off-the-record discussion between same. There was no evidence taken even though respondent McPherson requested the opportunity to put on witnesses and to present evidence. The Special Administrative Law Judge held that such was not necessary as the hearing dealt only with the issue of McPherson's liability for payment of the benefits ordered on September 26, 1995. It was the conclusion of the Special Administrative Law Judge that since McPherson was only impleaded for purposes of asserting a derivative liability under K.S.A. 1994 Supp. 44-503(g), no evidence was necessary. An Order that McPherson pay benefits granted claimant in Assistant Director David A. Shufelt's preliminary hearing Order of September 26, 1995 followed.

Respondent contends the Special Administrative Law Judge exceeded his jurisdiction in denying McPherson the opportunity to present evidence concerning the compensability of the claim and claimant's entitlement to preliminary benefits. It is respondent's position that this denial by the Special Administrative Law Judge violated McPherson's due process rights of notice, opportunity to be heard, and to present evidence. Respondent McPherson further contends that claimant failed to sustain his burden of proving the elements of his claim against the principal separate and apart from his claim against the subcontractor White Star.

Claimant counters that the 1994 amendments to K.S.A. 44-503 grant claimant the right to seek payment from the principal "in the event that the payment of compensation is not secured or is otherwise unavailable" from the immediate employer/subcontractor. Claimant further submits that McPherson is not entitled to relitigate the issues of compensability for purposes of preliminary hearing from the September 22, 1995 preliminary hearing because that Order was not appealed. We disagree.

K.S.A. 1994 Supp. 44-503 allows an employee of a subcontractor to elect whether to proceed against the principal contractor or, in the alternative, against his immediate employer, the subcontractor. Respondent McPherson correctly points out that the claimant may not proceed against both. See *Coble v. Williams*, 177 Kan. 743, 282 P.2d 425 (1955). In 1994, a new subsection (g) was added to K.S.A. 44-503. It provides:

"Notwithstanding any other provision of this section, in any case where the contractor (1) is an employer who employs employees in an employment to which the act is applicable, or has filed a written statement of election with the director to accept the provisions of the workers compensation act pursuant to subsection (b) of K.S.A. 44-505, and amendments thereto, to the extent of such election, and (2) has secured the payment of compensation as required by K.S.A. 44-532, and amendments thereto, for all persons for whom the contractor is required to or elects to secure such compensation, as evidenced by a current certificate of workers compensation insurance, by a certification from the director that the contractor is currently qualified as a self-insurer under that statute, or by a certification from the commissioner of insurance that the contractor is maintaining a membership in a qualified group-funded workers compensation pool, then, the principal shall not be liable for any compensation under this or any other section of the workers compensation act for any person for which the contractor has secured the payment of compensation which the principal would otherwise be liable for under this section and such person shall have no right to file a claim against

or otherwise proceed against the principal for compensation under this or any other section of the workers compensation act. In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, the principal shall be liable for the payment of compensation. No insurance company shall charge a principal a premium for workers compensation insurance for any liability for which the contractor has secured the payment of compensation." (Emphasis added.)

In this case claimant obtained an uncontested preliminary award of compensation pursuant to K.S.A. 44-534a, as amended, against respondent White Star. White Star was subsequently determined to be uninsured and the Special Administrative Law Judge ordered the principal, McPherson, to pay the preliminary award. The Special Administrative Law Judge had the authority to do this. However, when the compensability of claimant's claim against McPherson was made an issue, respondent McPherson had a right to present evidence. It is a fundamental principle of due process of law that all parties be given notice and the opportunity to present evidence. See, *Schulze v. Board of Education*, 221 Kan. 351, 559 P.2d 367 (1977). This principle is recognized in K.S.A. 44-534a(a)(2) which provides in pertinent part: "[N]o preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues." Thus, where claimant was seeking to secure payment from respondent McPherson of the compensation previously awarded against respondent White Star, respondent McPherson had a right to be heard and present evidence. Accordingly, the Appeals Board finds the May 20, 1996 preliminary hearing Order of Special Administrative Law Judge William F. Morrissey to be invalid, notwithstanding the provisions of K.S.A. 1994 Supp. 44-503(g).

The Appeals Board finds that it has jurisdiction to review this matter on an appeal from a preliminary hearing order. The Special Administrative Law Judge exceeded his jurisdiction by denying respondent McPherson the opportunity to present evidence. This appeal accordingly gives rise to Appeals Board jurisdiction pursuant to K.S.A. 44-551(b)(2)(A), as amended.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Special Administrative Law Judge William F. Morrissey dated May 20, 1996 should be, and is hereby, reversed and this matter is remanded to the Administrative Law Judge for a hearing on the disputed issues. The Appeals Board does not retain jurisdiction of this appeal.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1996.

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BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS  
Matthew S. Crowley, Topeka, KS  
White Star Commercial Coatings, Inc., Kansas City, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director